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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 395

EL PASO ELECTRIC COMPANY, Appellant

v.

ROBERT S. CALVERT, et al., Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

REPLY TO MOTION TO DISMISS

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Appellant, pursuant to Rule 40 (4), submits this Reply Brief in answer to Appellees' Motion to Dismiss. Page references are to State's Motion to Dismiss.

ARGUMENT

1. East Ohio Gas Co. v. Tax Comm'n, 283 U.S: 465 (1931)

At page six the State relies on the *East Ohio Gas* case. It is not in point because (1) it involves gas and not electricity and (2) the taxpayer there is an intervening intrastate distributor who takes the gas from interstate suppliers

and whose business activities are totally confined to the taxing state. It is not authoritative because:

(1) The entire essential part of the holding—that the gas has ceased to move in interstate commerce when the tax attaches—is grounded in the analogy between the reduction of gas pressure and the breaking of an original package after shipment in interstate commerce. The "original package doctrine"—always strained when applied to gas and electricity—has been clearly rejected with respect to them. *Panhandle Eastern Pipe Line Co. v Public Service Comm'n, 332 U.S. 507 (1947); Wisconsin-Michigan Power Co. v. FPC, 197 F.2d 472 (7th Cir. 1952), cert. den'd, 345 U.S. 934 (1953).* The State admits this in its Trial Court brief. *Broad River Power Co. v. Query, 52 F.2d 515 (E.D.S.Car., 1931), 60 F.2d 528 (E.D.S.Car., 1932),* an old district court case cited by the State at page seven, is founded upon the same outdated analogy. In addition, the *Broad River* case makes some highly questionable distinctions between power which has passed through transformers (intrastate commerce) and that which has not (interstate commmerce.) 52 F.2d 524.

(2) The test of whether the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business is outdated. [See *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* outlining "firm peaks of decision" in Commerce Clause tax cases, and Appendix D to Jurisdictional Statement.] Even if the test applies, there is no showing that this tax meets it.

(3) East Ohio was decided before the Court adopted the important multiple burdens test in 1938. See *Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938).* No multiple burdens question was raised in the *East Ohio* case.

2. Missouri v. Kansas Gas Co., 265 U.S. 298 (1924)

At page six, the State relies on *Missouri v. Kansas Gas Co.* That case determines validity of State *regulation* under the Commerce Clause. State regulation cases are not applicable to tax cases under the Commerce Clause. [See *Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* and recent authorities cited in Jurisdictional statement.] One old case, the *East Ohio Gas Co.* case relied on by the State above, [*283 U.S. 465, 472 (1931)*], has confused state power to regulate with state power to tax. The leading decisions make it clear, however, that regulation and tax cases are not interchangeable. [*See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959)* and Appendix D of *Jurisdictional Statement*]. Notably absent from the State's Motion is *FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965)*. If gas regulation cases are applicable to tax cases, then it is clear that, under the *Amerada* decision, *all* of the "sales" of power in Texas are exempt since intrastate and interstate electricity are commingled on the supplying lines. [TR. 37]. Appellant has urged under applicable *tax* cases that only the Texas "sales" of power generated in New Mexico are exempt from State taxation. If *Amerada* applies, then *all* sales of power by this Appellant should be exempt. No regulation case, however, governs validity of state taxation.

3. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942)

The *Beeler* case (page six) is inapplicable here because:

It is (1) a *net income* tax apportioned to business done within the taxing state, *not measured by gross receipts* and (2) laid on sales of *gas*. There is absolutely no question

about the validity of a properly apportioned net income tax. The tax in question is not that type and *Beeler* is inapplicable.

4. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) and *International Harvester Co. v. Indiana, 322 U.S. 340 (1944)*

At pages six and seven the State relies on the *McGoldrick* and *International Harvester* cases. They determine the validity of a sales tax laid on the sale of physical goods to which possession passes within the taxing state. Electricity is simply not analogous to physical goods. When it is "sold" no title changes hands, no physical property is delivered, and the entire transaction, occurring across state lines, is concluded in a fraction of a second. [See discussion of *Pfost* case analogy to physical goods at page 14 of Jurisdictional Statement]. If there is any analogy between electricity and tangible goods, it is between the delivery of the electricity in question and the delivery of physical goods which have been transported in interstate commerce. Clearly, such deliveries are not taxable by the States. *Railway Express Agency, Inc. v. Virginia, 347 U.S. 359 (1954); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422 (1947)* and *Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951).*

5. Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940)

At page eight, the State relies on the *Penney* case.

(1) That is a due process case applying due process tests under the 14th amendment. No due process question is raised here.

(2) It involves a net income (dividends) tax. It is irrelevant for the same reasons that *Beeler,* above, is irrelevant.

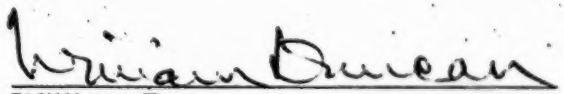
6. The State's Multiple Burdens Argument.

At page ten, the State argues that the gas is finally consumed in Texas and cannot thereafter be subjected to the risk of another tax. That argument, of course, ignores the obvious question: Is there a risk of multiple tax burdens *before* the final consumption of the electricity in Texas? Specifically, might New Mexico tax the generation and Texas the "sale" of identical power?

CONCLUSION

The inability of the parties to give meaningful treatment to this problem in the short Jurisdictional Statement and Motion to Dismiss demonstrates the complexity of it and the need for full briefs and oral argument on the merits.

Respectfully submitted.



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CERTIFICATE OF SERVICE

I, William Duncan, one of the attorneys for El Paso Electric Co., Appellant herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of August, 1965, I served copies of the foregoing Reply to Motion to Dismiss on the other parties hereto by mailing copies in a duly addressed envelope, air mail postage prepaid, to the attorney for all defendants, the Attorney General of the State of Texas, to the attention of Gordon Cass, Box R, Capitol Station, Austin, Texas.

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END